Nos. 76-212, 76-458, 76-468,
76-515, 76-520 and 76-522

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL., APPELLANT

v.

DONNY BRURELL BUCKLEY, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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In the Supreme Court of the United States

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No. 76-212

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* Together with No. 76-458 (*The School Town of Speedway, et al.* v. *Donny Brurell Buckley, et al.*); No. 76-468 (*The Metropolitan School Districts of Lawrence, Warren and Wayne Townships, et al.* v. *Donny Brurell Buckley, et al.*); No. 76-515 (*Otis R. Bowen, Governor, et al.* v. *United States, et al.*); No. 76-520 (*The Board of School Commissioners of the City of Indianapolis, et al.* v. *Donny Brurell, et al.*); and No. 76-522 (*The Housing Authority of the City of Indianapolis, et al.* v. *Donny Brurell Buckley, et al.*).

OPINIONS BELOW

The opinion of the court of appeals (Perry App. A1-A35)[1] is reported at 541 F. 2d 1211. The opinion of the district court (Perry App. A36-A50) is reported at 419 F. Supp. 180. Prior opinions of the court of appeals are reported at 474 F. 2d 81 and 503 F. 2d 68. Prior opinions of the district court are reported at 332 F. Supp. 655 and 368 F. Supp. 1191.

JURISDICTION

The judgment of the court of appeals (Perry App. A51) was entered on July 16, 1976. The notice of appeal in No. 76-212 was filed on July 26, 1976, and the appeal was docketed on August 12, 1976. The notices of appeal in No. 76-458 were filed on July 26, 1976, and the appeal was docketed on September 30, 1976. The notices of appeal in No. 76-468 were filed on July 26, 1976, and the appeal was docketed and a petition for a writ of certiorari was filed on October 4, 1976. The petitions for a writ of certiorari in Nos. 76-515 and 76-250 were filed on October 13 and 14, 1976, respectively. The petition for a writ of certiorari in No. 76-522 was filed on October 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and (2) and 28 U.S.C. 2103. As we discuss at pages 9-11, *infra*, we believe this Court does not have jurisdiction of the appeals.

[1] "Perry App." refers to the appendix to the jurisdictional statement in No. 76-212.

QUESTIONS PRESENTED

1. Whether the scope and effects of racial discrimination in the Indianapolis public school system and suburban school systems require the mandatory reassignment of students between separate school districts in the metropolitan area.

2. Whether the remedy designed in this case eradicates the effects of racial discrimination in the operation of the schools.

STATEMENT

The United States commenced this school desegregation suit on May 31, 1968, against the Board of School Commissioners of the City of Indianapolis, Indiana (IPS), pursuant to Section 407 of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. 2000c-6. On the basis of stipulations by the parties, the district court promptly entered a preliminary injunction ordering specific measures to desegregate the public school faculties.

On August 18, 1971, the district court held that IPS was "operating a segregated school system wherein segregation was imposed and enforced by operation of law" (Bowen App. A163).[2] The court of appeals affirmed (*id.* at A102 to A117) and certiorari was denied (413 U.S. 920).

The district court's 1971 decision postponed a final decision on a remedy for the unlawful racial separation of students. The court observed that the per-

[2] "Bowen App." refers to the appendix to the petition for writ of certiorari in No. 76-515.

centage of black students within IPS was approaching 40 and stated that a plan balancing the racial compositions of IPS schools "in the long haul * * * won't work" (Bowen App. A164) because "when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible" (*id.* at A160; see also n. 14, *infra*). Noting that the "tipping point" problem could be alleviated by consolidating IPS with surrounding school systems, the court directed the United States to join such additional defendants as might be necessary for litigation relating to the court's authority to order consolidation (*id.* at A165 to A167).

The United States joined all of the school corporations in Marion County (eight townships and two city corporations) as defendants but did not state a claim for relief against them (Perry App. A3). A few days later the district court permitted representatives of a class of black students to intervene as plaintiffs (*ibid.*). The intervening plaintiffs joined as defendants, and sought relief against, the Governor, Attorney General, Superintendent of Public Instruction and State Board of Education, and 19 school corporations.[3] The Indianapolis school board also joined as a defendant the Housing Authority of the City of Indianapolis (HACI), and by cross-com-

[3] The ten within Marion County that had already been joined on motion of the United States, plus nine districts in the adjoining counties of Boone, Hamilton, Hancock, Johnson, Morgan, and Hendricks.

plaint IPS charged HACI with establishing low-income housing projects in a manner that contributed to racial imbalance in the schools (*id.* at A38).

In 1973 the district court issued an opinion (Bowen App. A33 to A80) and a supplemental opinion (*id.* at A81 to A101) which concluded that relief promising a reasonable degree of permanent racial mixture in student assignments could not be accomplished within the present boundaries of IPS and that a final plan therefore must reassign students in other districts as well (*id.* at A40-A43). The court ruled that the State of Indiana shares the responsibility for racial separation in IPS and has a continuing duty to formulate a remedy (*id.* at A43-A52). The court therefore afforded the State an opportunity to select an appropriate, metropolitan-wide desegregation plan (*id.* at A56-A57). As interim relief, the court ordered that IPS rearrange its student assignments for the 1973-1974 school year so that each elementary school would have a minimum black enrollment of approximately 15 percent (*id.* at A66 to A67).[4]

In 1974 the court of appeals reversed the district court's orders to the extent that they required a remedy extending beyond Marion County or the boundaries established in 1969 for the Civil City of Indianapolis by 18 Indiana Stat. Ann. 18-4-4-1 *et*

[4] An interim order requiring the transfer of some black students to each of the added defendant school districts (*id.* at A65) was subsequently vacated by the district court (*id.* at A99).

seq. (1974) (the "Uni-Gov Act").[5] See Bowen App. A1 to A32. Insofar as the rulings pertained to a remedy within the boundaries of Uni-Gov, they were vacated and the case was remanded to "determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov" in accordance with *Milliken* v. *Bradley*, 418 U.S. 717 (Bowen App. A32). Finally, the court of appeals affirmed the interim relief ordered to be implemented within IPS. It stated, however, that the interim steps were insufficient to eliminate all of the effects of the racial discrimination within IPS (*id.* at A20), and it ordered the district court promptly to formulate a thoroughgoing plan (*id.* at A32). This Court denied certiorari (421 U.S. 929).[6]

On remand the district court entered an order that: (1) required the transfer of a sufficient number of black students in grades one to nine from IPS to the surrounding school districts to increase the

[5] Uni-Gov and contemporaneously enacted legislation limiting the annexation powers of IPS are set forth in part in Perry App. A66-A73 and are explained in detail by the court of appeals (*id.* at A9-A10, A15).

[6] Review had previously been sought and denied with respect to a number of other aspects of this litigation. See *School Town of Speedway* v. *Dillin*, certiorari denied, 407 U.S. 920; *Citizens of Indianapolis for Quality Schools* v. *United States*, certiorari denied, 410 U.S. 909; *Metropolitan School District of Lawrence Township* v. *Dillin*, certiorari denied, 412 U.S. 953; *Sendak* v. *Dillin*, stay denied, 412 U.S. 937.

proportion of black students in every school district in Marion County to no less than 15 percent (Perry App. A44-A45);[7] and (2) enjoined the location or establishment of additional low-income public housing projects within the borders of IPS (*id.* at A50).

A divided court of appeals affirmed. It agreed with the district court that two violations of the Equal Protection Clause of the Fourteenth Amendment supported the relief that had been ordered (Perry App. A2):

> The first was the failure of the state to extend the boundaries of * * * IPS when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis.

The court of appeals thought that the adoption of Uni-Gov without expansion of the boundaries of the school system of Indianapolis amounted to racial discrimination because, but for the failure to expand the boundaries, an expanded school district would have contained more white children and it would have been possible for the district court to decrease further the concentration of black students

[7] Two school districts (Washington and Pike Townships) were exempted from the order because they already had enrollments approaching 15 percent black (Perry App. A44).

within IPS. The court conceded that there were legitimate reasons for not expanding the boundaries of the school system, among them "that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes" (Perry App. A19). It concluded, however, that "[t]hese considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact" (*ibid.*).

The court of appeals also agreed with the district court that placement of all public housing within the borders of IPS has "tended to cause and to perpetuate the segregation of black pupils in IPS territory" (Perry App. A23), that sites for public housing had been selected for racial reasons (*ibid.*), and that future construction of public housing within IPS "would only further aggravate the school segregation problem" (*id.* at A24). It therefore affirmed the injunction against such further construction.[8]

Judge Tone dissented (Perry App. A26-A35). In his view, the facts found by the district court did not establish that the decisions not to expand the school system boundaries and to place public housing within IPS were made for racially discriminatory reasons. He therefore would have held that there is no viola-

[8] The court stated that it agreed with the district court's broader finding that "the primary reason [why the black population of Marion County is concentrated within IPS has been] * * * discrimination in the availability of housing opportunities for blacks in the suburbs" (Perry App. A22). See Bowen App. A129 to A132 for a summary of the district court's conclusions in this regard.

tion of the Equal Protection Clause requiring inter-district reassignment of students.

On August 20, 1976, Mr. Justice Stevens stayed the orders with respect to inter-district transfers of students pending final disposition of the case by this Court.

DISCUSSION

1. Appeals have been filed in Nos. 76-212 and 76-458; an appeal has been joined with a petition for a writ of certiorari in No. 76-468. The question whether this Court has jurisdiction of these appeals depends upon whether the court of appeals has held a state statute unconstitutional. See 28 U.S.C. 1254 (2). The district court and the court of appeals indisputably thought that transfers of students are required between IPS and other school systems in Marion County, but it is not clear whether (a) the court of appeals held the Uni-Gov Act and related statutes unconstitutional because they failed to provide for a consolidated school district, or (b) it believed that the state legislature acted improperly in failing to enact a consolidation statute.

It seems most likely that the court of appeals adopted the latter position. It did not invalidate any provision of the Uni-Gov Act; it did not dissolve the unification of the civil governments that has been produced by Uni-Gov; it did not order school districts to be consolidated into a single entity (as it might have done if it thought that their exclusion from Uni-Gov was an unconstitutional provision of the

statute). The court simply ordered students to be transferred between school districts that will retain their separate identities. This is consistent with a holding that Uni-Gov is constitutional, and that the state legislature should have gone further and passed additional consolidation legislation.[9]

If, as we believe, this reading of the decision of the court of appeals is correct, the appeals should be dismissed for want of jurisdiction and the papers whereon the appeals have been taken should be treated as petitions for a writ of certiorari. 28 U.S.C. 2103. Because we believe that this case presents serious questions warranting review by this Court (see pages 11-20, *infra*), we believe that the petitions for a writ of certiorari should be granted. It might be appropriate, however, to set Nos. 76-212, 76-458, and 76-468 for oral argument and to postpone resolution of the question of jurisdiction to the hearing of the case on the merits, in light of the fact that

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[9] Even if the courts below held state laws unconstitutional, the case was properly tried before a single judge. When this issue was previously presented to this Court (see *Metropolitan School District of Lawrence Township* v. *Dillin*, certiorari denied, 412 U.S. 953) we pointed out that the statutes involved apply by their terms solely to the Indianapolis Public School District or to the City of Indianapolis. "[A] single judge, not a three-judge court, must hear the case where the statute or regulation is of only local import." *Board of Regents* v. *New Left Education Project*, 404 U.S. 541, 542. See also *Griffin* v. *County School Board*, 377 U.S. 218. Cf. *Delaware State Board of Education* v. *Evans*, appeals dismissed for want of jurisdiction, November 29, 1976 (Nos. 76-416, 76-474, 76-475, 76-499, 76-500, and 76-501).

this Court's jurisdiction turns upon the interpretation to be given to the opinion of the court of appeals.

2. The United States commenced this suit to challenge racial discrimination by and within IPS. It prevailed on its claims. Full relief has been delayed for several years, however, while the district court has considered an expanded, inter-district remedy that the United States did not seek. In our view this delay has been fruitless, because the evidence has not demonstrated any purposeful inter-district racial discrimination of the sort that would justify an inter-district mandatory reassignment of students.

Under *Milliken* v. *Bradley*, 418 U.S. 717, students may not be assigned from one district to another unless the districts involved in the student assignment decree also have been involved in acts of racial discrimination with inter-district effects. The district court and the court of appeals found in the State's failure to consolidate IPS with surrounding districts an inter-district violation with inter-district effects, but there is little support for this conclusion.

The court of appeals has not articulated why Indiana's decision not to expand the boundaries of IPS had either a racially discriminatory purpose or an inter-district effect. That decision simply left the *status quo* alone. The court of appeals conceded that the Uni-Gov Act is racially neutral on its face, that its only "flaw" is that it does not alter the *status quo*, and that the decision not to expand the size of the school system is supported by legitimate reasons (Perry App. A19). The majority of the court of

appeals appeared to believe, however, that a racially discriminatory purpose was established because the failure to expand IPS to the outer limits of the new Uni-Gov area meant that most black students would continue to attend schools within IPS, and because this might increase the proportion of black students within those schools to a point that would precipitate "white flight." In other words, the court thought that a State is required to take affirmative steps to prevent particular school districts from becoming "too black," and that failure to take these steps amounts to racial discrimination.[10]

If this reading of the court of appeals' decision is accurate, that decision is inconsistent with *Washington* v. *Davis*, No. 74-1492, decided June 7, 1976. The record does not contain direct evidence showing why the Indiana General Assembly chose not to consolidate

[10] Our brief in the court of appeals observed that the district court's resolution of this point places the burden of avoiding "tipping points" solely on black children and disparages the interest of black parents in voting for school board members who will direct the education of their children. Moreover, the court of appeals seemed to assume that there is something wrong with schools containing a majority of black children. We disagree. So long as school authorities operate "just schools" instead of one set of schools for blacks and another for whites, it matters not at all whether one particular school has more blacks than whites. The Fourteenth Amendment does not prefer black schools, white schools, or mixed schools—it demands, instead, a policy of neutrality under which neither merit nor demerit is assigned on the basis of color, except insofar as is necessary to eradicate the effects of distinctions previously made in the operation of the schools on this impermissible basis.

the school corporations in Marion County, and this is not a case in which acts have a racially disproportionate impact inexplicable in the absence of discriminatory intent. The failure to alter the *status quo* had no independent effect at all. The court of appeals' decision would be correct, therefore, only if a State has an affirmative duty to eliminate racially disproportionate school populations in different school districts. There is no such duty, however, unless the disproportion in the racial characteristics of the students of the different districts was caused by state action. *Spencer v. Kugler*, 404 U.S. 1027, affirming 326 F. Supp. 1235 (D.N.J.).[11] That has not been demonstrated here.

The only way in which the court of appeals suggested that the State and the school district may have produced racially disparate attendance patterns between districts is the establishment by petitioner HACI of all of the area's low-income public housing projects within the borders of IPS. The court of appeals found that this had been done with a discriminatory motive (Perry App. A23). Even if this were correct, which we doubt,[12] it would not fol-

[11] In *Spencer* the Court summarily affirmed a district court's holding that extreme racial imbalance, without more, does not authorize a court to revise neutrally established school district lines. See also *Milliken* v. *Bradley*, *supra*.

[12] Judge Tone, in dissent, stated that "[t]he record before us does not contain findings or evidence that the state acted with a racially discriminatory purpose in connection with Uni-Gov or public housing siting" (Perry App. A27, footnote omitted), and that the district court's judgment accordingly

low that reassigning students from one school district to another is a proper response to this form of racial discrimination. Congress has enacted laws to rectify residential discrimination. See 82 Stat. 81 *et seq.*, 42 U.S.C. 3601 *et seq.* Racial discrimination in housing should be attacked directly and eliminated as expeditiously as possible from our society. Violators of the fair housing laws should be subjected to penalties; if public housing has been built in a discriminatory manner, future sites can be selected in a way that ends the discrimination. But the effects of housing discrimination ought not to be the object of a "collateral attack" in a school case, unless the housing discrimination was undertaken with the purpose of affecting attendance patterns in the schools. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-23.[13] There has been no finding in this case that the sites of public housing were selected for the purpose of affecting the racial compositions of the student populations of the schools. That being so, alleged discrimination in selection of sites of public housing would not provide justification for the reassignment of students from one school district to another.

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was incorrectly based on findings of racial effect alone. And see *Hills* v. *Gautreaux*, 425 U.S. 284, 305-306.

[13] On the other hand, if residential patterns had been influenced by the denial of access to particular schools on account of race, the existence of such patterns would not justify a failure to disestablish the invalid pattern of student assignments. Cf. *Swann, supra*, 402 U.S. at 20-21.

3. Even if there were evidence that the defendants in this case had engaged in intentional inter-district acts of racial discrimination with inter-district effects, it would not follow that the district court selected the proper remedy. The district court's remedy is designed to provide a degree of racial balance in all of the schools in Marion County. This relief has been prescribed without reference to the nature of the violations or their effects. Indeed, the district court did not even select school districts for inclusion in the plan on the basis of their participation (or lack of participation) in inter-district violations; it included or excluded them on the basis of the percentage of students who were black (see Perry App. A44).[14] The remedy thus is apparently designed to produce in the schools of Marion County a

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[14] The remedy was also selected, in substantial part, because the district court believed that "resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less" (Perry App. A42), and that it was necessary to spread black students throughout Marion County in order to prevent schools from reaching this "tipping point" which the district court called "resegregation" (*ibid.*). We disagree with the implications of this characterization. In our view, the Constitution forbids only racial discrimination and its effects; it does not prohibit racial imbalance in the schools if that imbalance arises from causes other than official racial discrimination. The district court's apparent belief that racial imbalance, however caused, is a violation of the Constitution would abolish the requirement that the racial separation have been caused by acts of the State intended to affect the operation of the schools (rather than, for example, the acts of private individuals choosing where to live). See *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189; *Spencer* v. *Kugler, supra.*

racial mixture that the courts below believe is desirable, rather than to eradicate the effects of racial discrimination.

We have stated in our memorandum in *Delaware State Board of Education* v. *Evans*, appeals dismissed for want of jurisdiction, November 29, 1976 (No. 76-416), and *Austin Independent School District* v. *United States*, vacated and remanded, December 6, 1976 (No. 76-200), that this is not the proper way to formulate the remedy in a school desegregation case. We believe that the principles we have articulated in those cases apply here as well. The goal of a remedial order in a school desegregation case should be to put the school system and its students where they would have been but for the violations of the Constitution. The goal is, in other words, to eliminate "root and branch" the violations and all of their lingering effects. *Green* v. *County School Board*, 391 U.S. 430, 438. It is to eliminate those effects wherever they may be found, starting from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 203.

In our view, "desegregation" is nothing more or less than the elimination of racial discrimination and all of its lingering effects, "root and branch." The desegregation that courts are both empowered and obligated to accomplish is not the elimination of all racial separation without regard to its causes, whether *de jure* acts or *de facto* social processes.

The existence of schools predominantly attended by members of one race does not in itself amount to racial discrimination; if it did, there would be no meaning to the requirement of state action as a precondition to a violation of the Fourteenth Amendment. This is the critical line between racial discrimination and its effects, on the one hand, and mere difference of racial composition of attendance, on the other. See *Austin Independent School District* v. *United States, supra*, slip op. 4-5 (Powell, J., concurring).

The proper approach requires a court to seek to determine the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects. A conclusion that there has been some racial discrimination does not in itself support an inference that the discrimination caused all of the observed racial separation. See *Keyes* v. *School District No. 1, Denver, Colorado, supra*. It therefore does not support a judicial order that racial balance must be produced throughout the school system. See *Austin Independent School District, supra*. This follows directly from principles long accepted by this Court. "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Brown* v. *Board of Education*, 349 U.S. 294, 300. The task of an equitable decree is to correct the condition that offends the Constitution. A finding of a violation does not set a court at large to produce results that never would have occurred if all constitutional provisions had been observed. The court

must instead order whatever steps are necessary for "disestablishing state-imposed segregation" (*Green*, *supra*, 391 U.S. at 439).

As the Court observed in *Swann*, *supra*, 402 U.S. at 15: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." To this end there is broad equitable power "to remedy past wrongs" (*ibid.*). But the task is not to produce a result merely because the result may be considered desirable. "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. * * * As with any equity case, the nature of the violation determines the scope of the remedy" (*id.* at 16). "[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, *supra*, 418 U.S. at 746. Cf. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764, 768-773.[15]

Our position is supported not only by this Court's cases but also by the judgment of Congress. In the Equal Educational Opportunities Act of 1974, 88 Stat. 516, 20 U.S.C. (Supp. V) 1712, Congress provided that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court * * * shall seek

[15] *Hills* v. *Gautreaux*, *supra*, is not to the contrary. In *Gautreaux* the Court specifically relied on the circumstance that "[t]he relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits" (425 U.S. at 299).

or impose only such remedies as are *essential to correct particular denials* of equal educational opportunity or equal protection of the laws" (emphasis added).

The district court's remedial plan cannot survive scrutiny under these principles. It is most unlikely that, but for any racial discrimination that may have had inter-district effects, every school district in Marion County would have had approximately 15 percent black students. The drawing of the IPA boundaries, and the failure to expand them, would not have had a significant effect upon the residential patterns of the County, and therefore would not have prevented racial mixture throughout the County. Although the selection of sites for public housing may have inhibited the distribution of black children throughout the district, there has been no showing here that a more nearly uniform scattering of public housing would have produced the almost completely uniform distribution of students required by the district court's order.[16] We therefore conclude that the

[16] The reasonably possible inter-district effects in this case might be summarized as follows. First, the school reorganization, annexation and Uni-Gov legislation froze long-established school district boundaries in Marion County and thus had no causal effect upon the disparate racial compositions of schools in Marion County. The most that might be said is that this legislation perpetuated racial disparities to the extent that the area's black teachers would have been assigned on a less disparate basis and black IPS students would have transferred voluntarily to suburban schools in a consolidated district. Second, the concentration of all low income public housing projects within IPS was a significant "influence to-

rectification of any possible inter-district acts of official racial discrimination found here (see notes 12 and 16, *supra*) does not call for mandatory inter-district reassignments of students of the magnitude prescribed by the courts below.[17]

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ward keeping black students confined within IPS, while at the same time keeping the suburban school systems virtually all-white" (Perry App. A46). Third, nearly all of the black students and teachers in the area live in IPS, concentrated and intentionally segregated into "black" schools. As this Court noted in *Keyes, supra,* 413 U.S. at 202, such discrimination has the "effect of earmarking schools according to their racial composition, and * * * may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing racial concentration within the schools." But none of these possibilities could have resulted in inter-district effects of the magnitude involved in the across-the-board inter-district relief ordered by the courts below.

[17] Arguments similar to those outlined here were presented to the court of appeals, and we proffered the suggestion that an order permitting voluntary transfers of black IPS students to the added defendant districts (in conjunction with the final desegregation of IPS schools) might be appropriate if some inter-district effects of discrimination were found The court responded by stating that the United States "condemns the only relief which can make its demand [for the complete elimination of illegal segregation in IPS schools] a reality" (Perry App. A25). That statement appears to be based on an assumption that full eradication of the effects of racial discrimination cannot be achieved in any school system 40% or more black because "white flight" would lead to "resegregation." The evidence shows that the probability of "white flight" from IPS has been greatly overstated. But, even so, as the Court noted in *Milliken, supra,* 418 U.S. at 747 n. 22, many of the cases in which this Court has approved system-wide desegregation plans have involved districts with

4. The jurisdictional statements and petitions for certiorari present numerous additional questions, some of which would not independently appear to require scrutiny.[18] We believe, however, that all of the questions presented in the many requests for review are related sufficiently closely to the principal issues on which we believe the court of appeals erred that the Court should consider all of them if it grants review of the judgment below.

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considerably higher black percentages, and the Court has never held that desegregation cannot be accomplished in a system with substantial numbers of black students.

[18] These questions include: (1) whether the court of appeals erred in "supplying" findings of fact not made by the district court (No. 76-468 J.S. 4); (2) whether the court of appeals erred in allowing the remedial area to include two municipalities that have not been fully merged into the Uni-Gov area (No. 76-458 J.S. 4); (3) whether the State shares responsibility for any illegal racial discrimination (No. 75-515 Pet. 4); (4) whether the district court improperly suggested that the remedy should be monitored yearly (*id.* at 23); (5) whether the remedial order fully complied with the Equal Educational Opportunities Act of 1974, discriminates against black students, or has educational or financial deficiencies (No. 76-520 Pet. 2-3); and whether HACI violated the rights of school students and, if so, whether it was proper for the district court to preclude further construction of public housing within the boundaries of IPS (No. 76-522 Pet. 2).

CONCLUSION

The Court should set Nos. 76-212, 76-458, and 76-468 for oral argument and postpone resolution of the question of jurisdiction to the hearing of the case on the merits. The Court should grant the petitions for a writ of certiorari in Nos. 76-515, 76-520, and 76-522.

Respectfully submitted.

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JANUARY 1977.

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